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Editorial

EU Foreign Direct Investment Screening: Europe qui protège?

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The EU Regulation on the Screening of Foreign Direct Investments was agreed in March 2019 and will enter into force in April.[1] There will be a period of adjustment of 18 months, after which the new system becomes operational. The Regulation co-ordinates and partially harmonises the national FDI screening mechanisms that are currently in place in approximately half of the Member States. Its adoption follows the much more aggressive use of FDI screening by the US, first in the wake of the September 11 attacks and subsequently in the context of the rising tensions with China inter alia in the field of trade.

The Regulation enters into force against the background of increased calls for the EU to adopt a more protective role. A good example is provided in the recent visions for European integration set out by the French President Emmanuel Macron and the new leader of the German Christian Democrats, Annegret Kramp-Karrenbauer.[2] In many respects the radical, progressive proposals of Macron and the cautious, conservative views of Kramp-Karrenbauer were in conflict with each other. However, on one issue they agreed: the EU needs to become more active in protecting European interests in the global arena. Both leaders made explicit reference to China, while the European Commission and the EU's High Representative for Foreign Affairs and Security Policy have recently called the country a "systemic rival" and proposed actions to promote a more balanced and reciprocal trade and investment relationship, a level playing field, and the protection of critical infrastructure and the technological base in Europe.[3]

At a first glance, the new Regulation might appear tailor-made to answer these calls. It is based on art.207 TFEU, which gives the EU an exclusive competence in the field of common commercial policy. Since the Lisbon Treaty, this includes foreign direct investment. The instrument is a directly applicable regulation and the Commission is given an important role in the screening process. Good reasons could be offered for a heavy EU involvement: in the absence of a European response, foreign investors might be able to divide and rule, playing one country against another. An investment in one country could also create risks for the others in an increasingly integrated and interconnected Europe. Yet there are also powerful countervailing forces that militate for a central role for individual Member States. According to art.4(2) TEU, national security remains the sole responsibility of each Member State. Different countries have very different perceptions of security threats. This reflects their different economic and geopolitical situations, among other things. Germany may be concerned about Chinese government controlled undertakings taking over key German companies, but Portugal may see the investments as beneficial, while Poland's security establishment worries about the Suwalki Corridor rather than the Belt and Road Initiative. As long as different countries look in different directions when thinking about threats to national security, integration will remain difficult—it is not Europe that protects, but individual Member States.

[1] Regulation 2019/452 establishing a framework for the screening of foreign direct investments into the Union, available at *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019R0452* [Accessed 26 March 2019]. The Regulation was analysed in J. de Kok, "Towards a European Framework for Foreign Direct Investment Reviews" (2019) 44 E.L. Rev. 24. For a debate covering many aspects of the Regulation, see *https://verfassungsblog.de/category/focus/a-common-eu-law-on-investment-screening/* [Accessed 26 March 2019].

[2] President Macron, "Renewing Europe" (March 2019), available at *https://www.project syndicate.org/commentary/three-goals-to-guide-european-union-renewal-by-emmanuel-macron-2019-03*; Annegret Kramp-Karrenbauer, "Making Europe Right" (March 2019), available at *https://www.welt.de/politik/article190051703/Annegret-Kramp-Karrenbauer-Making-Europe-Right.html* [Both accessed 26 March 2019].

[3] Commission, "EU-China—A strategic outlook" JOIN(2019) 5 final.

In reflection of some of the tensions described above, the Regulation adopts a highly unusual approach: it does not compel Member States to engage in the screening of foreign direct investments, but if they do, it sets out a mechanism of co-ordination and provides for partial harmonisation. Other Member States and the Commission may offer their comments or opinion to the Member State that is conducting the screening. The screening process itself must comply with requirements such as non-discrimination, a certain level of transparency, the protection of commercial secrets, and a possibility to seek recourse. There are undoubted practical benefits: for example, the co-ordination mechanism allows the Member States with greater resources to share intelligence that may be unavailable for smaller countries.

Yet there are also dangers and flashpoints. In particular, the Regulation provides that the screening grounds are security or public order. This represents a rejection of some of the earlier proposals that would have included economic grounds as well. But questions remain: under art.4 of the Regulation Member States may consider the effects of the investment undergoing screening on critical technologies, including artificial intelligence, robotics, semiconductors, aerospace, energy storage, quantum technologies as well as nanotechnologies and biotechnologies. If a Member State takes a wide view of security in the context of the Regulation, economic considerations will easily slip into the assessment. Further, it is not clear how far the Treaty rules on free movement of capital actually allow Member States to go in this respect. Free movement of capital has an *erga omnes* effect: it applies also between Member States and third countries. However, the case law has established that Member States may be able to offer justifications for restrictions on capital movements between the EU and third countries that would be rejected in the intra-EU context,[4] but the full extent of this increased national regulatory autonomy is not laid down with any precision.

The Regulation is designed to protect Europe from suspicious foreign investments but it may also have the surprising effect of strengthening the position of third-country investors. Prior to the Regulation, some national screening mechanisms were outside the scope of EU law. This was due to the case law of the Court that sought to distinguish between the right of establishment and the free movement of capital. Under this case law, a national rule that only ever applies to situations where investors seek to exert a definite influence on the target company falls exclusively within the freedom of establishment,[5] which does not protect third-country investors. As a result, a national screening system that solely concerned situations where a third-country investor was acquiring control of the target firm was not governed by the four freedoms at all. By contrast, the Regulation now brings national screening mechanisms within the scope of EU law. An investor may raise concerns if a decision does not reflect the grounds set out in the Regulation or if the process does not comply with its requirements. Further, other EU instruments such as the Charter of Fundamental Rights become applicable. For example, how well do national rules, and even the Regulation's requirement of a possibility to "seek recourse"[6] against screening decisions, reflect the right of access to courts found in art.47 CFR? The protection that Europe offers may in fact end up benefitting third-country investors just as much as EU citizens.

[JS]

[4] See e.g. *Test Claimants in the FII Group Litigation v Inland Revenue Commissioners* (C-446/04) EU:C:2006:774; [2007] 1 C.M.L.R. 35 at [171].
[5] *Test Claimants in the FII Group Litigation v Inland Revenue Commissioners* (C-35/11) EU:C:2012:707; [2013] 1 C.M.L.R. 50 at [98].
[6] Article 6 of the original proposal, COM(2017) 487 final, talked of "judicial redress".

Articles

Between "Administrative Mindset" and "Constitutional Imagination": The Role of the Court of Justice in Immigration, Asylum and Border Control Policy

Daniel Thym

The Court of Justice is a central actor. It is the subject of many studies, most of which concentrate on the internal market or citizenship. By contrast, the role of judges in migration law is rarely discussed, although the policy field is politically contested and features prominently in recent case law. That is why this contribution takes a bird's eye view of the role of the ECJ in that domain. It critically assesses a concern about "judicial passivism" among academic observers and demonstrates that there are good constitutional reasons why judges act carefully in migratory matters. Closer inspection of several dozen prominent judgments on migration shows that most of them are defined by an "administrative mindset": they focus on statutory interpretation and seek to realise the position of the legislature. Any move towards a more ambitious "constitutional imagination" would require feedback loops between legal developments, political processes and broader societal debates.

Can Two Walk Together, Except they be Agreed? Preliminary References and (the Erosion of) National Procedural Autonomy

Anna Wallerman

The Court of Justice's case law on procedures and remedies before national courts has been highly scrutinised and often criticised, in particular for intruding on the procedural autonomy of the Member States. This article argues that the responsibility for such a development lies at least partially with the national courts. Drawing on an empirical analysis as well as in-depth case studies, the article shows that national courts requesting preliminary references from the Court often actively seek an answer promoting European integration over national autonomy. Furthermore, the analysis suggests that, when a national court assertively argues for the preservation of national procedural rules, it has a comparatively good chance of persuading the Court of Justice. The article concludes that there is still a case to be made for national procedural autonomy, but the success of that case depends upon the national courts' use of the preliminary reference procedure.

The Founding Myth of European Human Rights Law: Revisiting the Role of National Courts in the Rise of EU Human Rights Jurisprudence

Giacomo Delledonne* and *Federico Fabbrini

A conventional story argues that the ECJ developed a human rights jurisprudence in response to national pressures. The purpose of this article is to reconsider and nuance this simplistic understanding. First, the article underlines how the case law of the ECJ recognising fundamental rights as general principles of EU law predates the Solange *case law of national courts. Secondly, the article carries out a structural examination of fundamental rights in the founding EU Member States and reveals that the mechanisms for human rights protection were weak—if not absent—in the majority of them. Thirdly, the article examines in depth the jurisprudence of national constitutional courts and emphasises how even in states like Italy or West Germany in the 1950s and 1960s constitutional courts were anything but aggressive in protecting fundamental rights. In conclusion, the article suggests that the rise of an EU human rights jurisprudence should be seen as the result of a* transnational *development consisting of greater sensitivity towards human rights at all levels of government—and not of a* supranational *response to* national *pressures.*

The Concept of "Agreement" under Article 101 TFEU: A Question of EU Treaty Interpretation

Kelvin Hiu Fai Kwok

Despite the importance of the "agreement" concept under art.101(1) TFEU, the concept remains underdeveloped by courts and commentators. This article reconstructs the "agreement" concept based on theories of legal interpretation and contract as well as comparative law insights. It argues, based on a theoretical framework for EU Treaty interpretation and a broad, objective conception of an antitrust agreement, that the objectivity and correspondence requirements for contractual agreements have continuing relevance, while the precision requirement should be appropriately relaxed, for antitrust agreements. Drawing on insights from US antitrust jurisprudence, it advances three concrete proposals

emerging from the in-depth comparison between antitrust and contractual agreements, namely that the art.101(1) "agreement" concept embraces tacit collusion, encompasses concerted practices and decisions of associations, and is independent of subjective intentions.

Analysis and Reflections

Online Platforms and Selective Distribution: *Coty* Ruling Addresses Topical E-Commerce Issues
Katri Havu* and *Neža Zupančič
This contribution discusses the preliminary ruling in Coty (C-230/16) in which the European Court of Justice addresses competition law ambiguities pertaining to selective distribution, in particular with respect to the use of third-party online platforms as a distribution channel. Importantly, the judgment confirms that suppliers of luxury products can prohibit authorised distributors from selling goods on general online platforms. This contribution analyses the ruling and discusses selective distribution, preserving a luxury or prestigious product image, and vertical agreements in the context of e-commerce.

The Substance of Rights: New Pieces of the *Ruiz Zambrano* Puzzle
Hester Kroeze
To promote and facilitate free movement in the European Union, Directive 2004/38 provides a generous regime for family reunification for EU citizens who move to a Member State of which they are not a national. In Ruiz Zambrano*, the European Court of Justice established a right to family reunification for citizens who reside in the Member States of which they are a national on the basis of art.20 TFEU if the refusal of such a right would deprive them of the genuine enjoyment of the substance of their rights as European citizens. A legal framework to determine the limits and conditions under which this right can be exercised is lacking, however. This article investigates these limits and conditions through an analysis of the case law concerning art.20 TFEU. To shape this inquiry, a comparison is made between family reunification rights awarded by Directive 2004/38 and those derived from art.20 TFEU. The last part of the analysis explores the role of the right to family life in the art.20 TFEU case law, and compares the protection of family life it offers to the threshold of art.8 ECHR.*

Brexit and Public Procurement: Transitioning into the Void?
Pedro Telles* and *Albert Sanchez-Graells
On 29 March 2017, the UK notified its intention of leaving the EU. This activated the two-year disconnection period foreseen in art.50 TEU, thus resulting in a default Brexit at the end of March 2019. The firming up of a draft agreement on a transition period to run until 31 December 2020 could provide a longer timescale for the Brexit disconnection, as well as some clarity on the process of disentanglement of the UK's and EU's legal systems. The draft transition agreement of 19 March 2018, updated on 19 June 2018 and still under negotiation at the time of writing, provides explicit rules on public procurement bound to regulate "internal" procurement trade between the UK and the EU for a period of over 15 months. However, the uncertainty concerning the future EU–UK relationship remains, and the draft agreement does not provide any indication on the likely legal architecture for future EU–UK trade, including through public procurement. The draft agreement has thus not suppressed the risk of a "cliff-edge" disconnection post-Brexit, but rather only deferred it. The transition is currently not into an alternative system of procurement regulation, but rather into the void. There have also been very limited developments concerning the UK's and EU's repositioning within the World Trade Organization Government Procurement Agreement (WTO GPA), which creates additional legal uncertainty from the perspective of "external" trade in procurement markets due to the absence of a "WTO rules" default applicable to public procurement. Against the backdrop of this legal uncertainty, this article critically assesses the implications of the 2018 draft transition agreement, both for the re-regulation of "internal" EU–UK procurement, and for the repositioning of both the EU and the UK within the WTO GPA, as the basis for their "external" procurement trade with third countries. The article concludes that it is in both the UK's and the EU's interest to reach a future EU–UK FTA that ensures continued collaboration and crystallises current compliance with EU rules, and to build on it to reach a jointly

negotiated solution vis-à-vis the rest of WTO GPA parties. The article constitutes a detailed case study that provides insights applicable to other areas of Brexit-related trade re-regulation.

Book Reviews

Forthcoming in European Law Review

Conceptualisation and Application of the Principle of Autonomy of EU Law—The CJEU's Judgment in *Achmea* Put in Perspective
Steffen Hindelang
It seemed that the Court of Justice of the European Union wanted to make it short and sweet: It took the Grand Chamber in its Achmea *judgement less than fifteen pages to conclude that Investor-State dispute settlement in an intra-EU context is incompatible with EU law. The judgment is noteworthy in terms of both the conceptualisation as well as the application of the principle of autonomy of EU law. In terms of conceptualisation of the principle, what we witness in* Achmea*, read in conjunction with another decision, could be a first subtle attempt to enrich the principle with notions of the rule of law. In terms of application, the Court further strengthens legal equality, its judicial monopoly, and—perhaps even more importantly—the role of the Member States' courts, understood as "traditional permanent State courts", in the judicial dialogue.*

Ownership Structures and Beneficial Ownership: Registering and Investigating the Unknown
Ondřej Vondráček* and *David Ondráčka
This article analyses the key issues in the implementation of the new corporate ownership and beneficial ownership disclosure obligation introduced by the fourth EU Anti-money Laundering Directive. It discusses some of the immediate and potential issues arising from the interlinked problems of effectiveness and efficiency of identification and evidencing of corporate ownership structures and beneficial owners, and comes up with a possible comprehensive solution for these issues which consists in developing a practical guidance on disclosure of corporate and beneficial ownership structures. This guidance—in the Practical Guide on disclosure and evidencing of corporate and control structures and beneficial owner(s) for the process of verification of disclosed ownership structures and beneficial owners, and in the Handbook for disclosure of beneficial ownership and beneficial owners for the process of investigation of unknown ownership structures and beneficial owners—would elaborate in detail the provisions of the guidance on transparency of beneficial ownership issued by the Financial Action Task Force.

Structural Consequences of Cross-border Company Seat Transfers within the EU in the Latest Court of Justice Case Law: *Polbud*
Julie Benedetti* and *Arnaud Van Waeyeberge
Due to the lack of European legislative measures on cross-border transfer of registered offices, Member States currently retain their competence in this field. However, Member States are required to respect the fundamental freedoms of the EU internal market under the purview of the Court of Justice of the European Union. The purpose of this article is to comment on the latest stage of this jurisprudential evolution through an analysis of the Polbud *judgment (C-106/16). This case clarifies the regulatory context surrounding the transfer of a registered office within the internal market since it liberalizes companies cross-border mobility by accepting that the benefit of freedom of establishment does not require the pursuit of a genuine economic activity or the relocation of the real head office of the company. Finally, the practical and political consequences of the ruling complete the analysis.*